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In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

JANET RENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly is not subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, is ripe for judicial determination at this time.

2. Whether appellant's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly does not have a retrogressive purpose and effect is ripe for judicial determination at this time.

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MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the United States respectfully moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The memorandum opinion of the district court (J.S. App. 1) is reported at 117 F. Supp. 2d 46.

JURISDICTION

The judgment of the district court was entered on October 17, 2000 (J.S. App. 18). The notice of appeal was filed on October 20, 2000 (J.S. App. 19), and an amended notice of appeal was filed on November 1, 2000 (J.S. App. 24). The jurisdictional statement was filed on November 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Virginia is a jurisdiction covered under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b. See 28 C.F.R. Pt. 51 App. Thus, it cannot implement a change in any "standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c, unless it obtains "preclearance" of the new practice. It can obtain preclearance by obtaining a determination either from the Department of Justice or from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [on account of membership in a language minority group]." 42 U.S.C. 1973c.

2. The United States Constitution requires a decennial census of the population. U.S. Const. Art. I, § 2, Cl. 3. Data from the census are used to calculate state population totals for congressional reapportionment. *Ibid.* Under Section 141(b) of the Census Act, the Secretary of Commerce must report state population totals from the 2000 census to the President within nine months of the census date, *i.e.*, by January 1, 2001. 13 U.S.C. 141(b). The population data provided to the President pursuant to Section 141(b) are "for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b). The Census Act also requires the Census Bureau to report census data for very small geographical areas ("census blocks") "to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting" of each State by April 1, 2001. 13 U.S.C. 141(c). The Census Bureau's decennial data are also used for other important purposes, such as allocation of funds by federal and state agencies. The

Census Act provides that the Secretary of Commerce "shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions" of the Act, except for "purposes of apportionment of Representatives in Congress among the several states." 13 U.S.C. 195.

Since 1940, the Census Bureau has documented a population undercount in the decennial census. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 322 (1999). The undercount "has been measured in one of two ways," by comparing the unadjusted figures both with an "independent estimate of the population using birth, death, immigration, and emigration records," and with a "large sample survey * * * that is conducted in conjunction with the decennial census." *Id.* at 322. Those measurements indicate that "[s]ome identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole." *Id.* at 322-323; see also J.S. App. 4; United States Dep't of Commerce, Bureau of the Census, *Report to Congress The Plan for Census 2000*, at 2-4 (1997) *(Plan for Census 2000)*. In 1997, the Census Bureau reported to Congress that it would study ways to improve the accuracy of the census, including the use of sampling and other statistical correctional methods. *Plan for Census 2000*, at 6. The Census Bureau informed Congress of its plans to incorporate statistical sampling into Census 2000, and to produce one set of census figures to be used for all purposes, including apportionment under 13 U.S.C. 141(b) and redistricting under 13 U.S.C. 141(c). *Plan for Census 2000*, at 23, 32. After receiving that Report, Congress enacted legislation with respect to census data adjustment, requiring that any release of statisti-

cally adjusted data on the 2000 census be accompanied by a companion set of block-level population data for which statistical methods were not employed. Act of Nov. 26, 1997, Pub. L. No. 105-119, Tit. II, § 209(j), 111 Stat. 2483. Litigation followed challenging the use of statistical sampling to determine the population for congressional reapportionment.

In *Department of Commerce*, this Court held that Section 141(b) of the Census Act prohibits the use of statistical sampling in calculating the population for congressional apportionment purposes. 525 U.S. at 343. The decision in *Department of Commerce* did not address the use of statistically adjusted data reported to the States for purposes of state and local redistricting under Section 141(c) of the Act. See pp. 19-20, *infra*. After this Court's decision in *Department of Commerce*, the Census Bureau released an updated summary of its development of two operational plans for the 2000 census: one for providing unadjusted data for purposes of congressional apportionment, and a second for providing statistically adjusted data for all other purposes. See United States Dep't of Commerce, *United States Census 2000, Updated Summary: Census 2000 Operational Plan* (Feb. 1999).

In June 2000, the Census Bureau issued a statement on the feasibility of using statistics to improve the accuracy of the 2000 census. See United States Dep't of Commerce, *United States Census 2000, Accuracy and Coverage Evaluation, Statement on the Feasibility of Using Statistical Methods to Improve the Accuracy of Census 2000* (June 2000) (*Statement on Feasibility*). The Census Bureau stated that as part of the operations for Census 2000, it will conduct an Accuracy and Coverage Evaluation (A.C.E.), which is designed to improve census accuracy by increasing overall coverage

and reducing the differential undercount. The result of the A.C.E. would be to produce statistically corrected data. *Statement on Feasibility* 1-2, 4-7, 9-10. The A.C.E would also correct for "the small overcount that occurs when erroneous enumerations are included in the census." *Id.* at 2. The Census Bureau stated, however, that it would not release adjusted data until "it has brought its technical judgment to bear in assessing the available data to verify that its expectations have been met." *Id.* at 52. The Bureau observed that "all major census operations are vulnerable to unanticipated difficulties" that "could also affect the A.C.E.," in which case the Bureau would delay release of adjusted counts and take steps to "conduct and complete (or repeat, as necessary) all planned operations necessary to ensure that an accurate A.C.E. had taken place before releasing the statistically corrected data." *Ibid.* The Director of the Census Bureau testified in May 2000 that while the Bureau expects the corrected census figures using A.C.E. "will be the more accurate numbers," it will not use the adjusted numbers if it "does not have confidence in the A.C.E. results." Statement of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives (May 19, 2000), 2000 WL 668026.

The Department of Commerce recently promulgated a final rule that sets out the procedures for the release of statistically adjusted population data for use by States and localities pursuant to 13 U.S.C. 141(c). 15 C.F.R. 101.1, 101.2 (effective Nov. 6, 2000), published in 65 Fed. Reg. 59,713 (2000). In its discussion of the final rule, the Department explained that while it "expects the statistically corrected data to be more accurate for non-apportionment uses," "no decision has been

reached" on issuing those data. *Id.* at 59,714. The Department stated that if the statistical adjustment "would not improve the accuracy of the initial census counts, then the data without statistical correction would be released" to the States by the April 1, 2000 deadline. *Ibid.* The rule delegates to the Director of the Bureau of the Census the authority to make the final determination regarding the method to be used in calculating the tabulation of populations reported to States and localities pursuant to 13 U.S.C. 141(c). 15 C.F.R. 101.1(a)(2); 65 Fed. Reg. at 59,715. The rule does not, however, diminish the Secretary's authority to revoke or amend that delegation. 15 C.F.R. 101.1(a)(5) ("Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation."); 65 Fed. Reg. at 59,715 ("[T]he current or any future Secretary of Commerce could revoke that delegation by issuing another final rule doing so.").

3. Earlier this year, the Virginia General Assembly enacted new legislation, 2000 Va. Acts ch. 884 (Chapter 884), which requires the use of "actual, enumerated" —*i.e.*, unadjusted—population counts provided by the Census Bureau for the purpose of redrawing boundaries of congressional, state Senate, and state House of Delegates districts. Va. Code Ann. § 24.2-301.1 (Michie 2000). Chapter 884 also directs governing bodies of counties, cities, and towns to use unadjusted data in drawing districts. *Id.* § 24.2-304.1.[1] The General

[1] The new law also reduces the time during which counties, cities, and towns are prohibited from altering precincts or chang-

Assembly also enacted legislation that authorizes the State Board of Elections to reschedule the state-wide primary election of June 12, 2001, if necessary. 2000 Va. Acts ch. 886.[2] Chapter 886 relaxes candidate qualifying and other deadlines for state and county elections if redistricting has not been completed and preclearance under Section 5 has not been obtained in time to hold the primary at the regularly scheduled time. Chapter 886 authorizes the postponement of Virginia's 2001 primary election to a date as late as September 11, 2001, and permits a decision as late as May 12, 2001, as to whether a postponement is necessary. These provisions extend to all primary elections for state legislative office and for seats on county governing bodies and elected school boards.[3]

4. On May 18, 2000, Virginia filed a complaint under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that Chapter 884 should be precleared under Section 5 or, in the alternative, was not subject to Section 5. Specifically, Virginia alleged in Count I that Chapter 884 does not require Section 5 preclearance because (1) the Census Act and the United States Constitution require the use of unadjusted figures, and (2) Virginia's continued use

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ing the boundaries of any precincts. Under the old law, changes were prohibited from Sept. 1, 1998 to June 1, 2001. The amended provision, Va. Code Ann. § 24.2-309.1 (Michie 2000), permits localities to redraw precincts beginning May 15, 2001.

[2] On the same day as it enacted Chapter 886, the legislature also enacted another, virtually identical statute, 2000 Va. Acts ch. 908. For convenience, we refer herein to Chapter 886.

[3] Virginia submitted Chapters 886 and 908, see note 2, *supra*, to the Department of Justice for administrative preclearance under Section 5. On August 3, 2000, the Department of Justice precleared Chapters 886 and 908.

of unadjusted figures does not constitute a change in redistricting practices within the meaning of Section 5. Count II of the complaint alleged that the Department of Justice planned to use adjusted figures classified by the Department of Commerce as "P.L. No. 94-171 data"— *i.e.*, released by the Department under 13 U.S.C. 141(c) — in preclearance evaluations and that such use would violate the Census Act and is unconstitutional. Counts III and IV alleged that, even if preclearance is required, Chapter 884 was not enacted with a retrogressive purpose, nor does it have a retrogressive effect, within the meaning of Section 5 of the Voting Rights Act. Count V alleged that Va. Code Ann. § 24.2-309.1 (Michie 2000), which extends the time for localities to draw voting precincts, does not have a retrogressive purpose or effect within the meaning of Section 5.

A three-judge court was convened, pursuant to 42 U.S.C. 1973c, and numerous parties were granted intervention. The United States moved to dismiss Counts I, III and IV without prejudice or to stay the proceedings, on the ground that Virginia's claims were not yet ripe. The United States argued that Virginia's claims would not be ripe unless and until the Census Bureau releases adjusted census data, since if the Bureau should choose to release only unadjusted data, the Commonwealth's claims would be hypothetical. The United States moved to dismiss Count II on ripeness grounds and for failure to state a claim. The district court heard argument on September 21, 2000.

5. On October 17, 2000, the district court dismissed Counts I, II, III and IV on ripeness grounds. The district court granted preclearance of Va. Code Ann. § 24.2-309.1 (Michie 2000), set out in Count V. J.S. App. 1-17.

The court first addressed Virginia's claims for a declaration that Chapter 884 does not have a retrogressive purpose or effect (Counts III and IV). The court determined that assuming that Chapter 884 is "subject to preclearance under Section 5," the district court could not assess the "retrogressive effect" of the statute because "[t]o evaluate Virginia's legislation under Section 5, the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a 'retrogression in the position of racial minorities with respect to [voting].'" J.S. App. 11. The district court stated that "[t]his analysis need only be conducted if and when the Census Bureau releases adjusted figures." *Id.* at 11-12. The district court explained that "[i]f the Census Bureau does not release adjusted data, Chapter 884 will have no practical effect, and this court would not need to grapple with the issue of whether to define retrogression in terms of adjusted figures." *Id.* at 12. The district court observed that, while the Census Bureau "has announced that it plans to release adjusted figures, it has not yet committed to doing so," and that the Census Bureau will "make its final decision on whether to release adjusted data after" it evaluates their quality and accuracy. *Ibid.*

The court also found that Virginia "has not satisfied the 'hardship' prong of the * * * ripeness inquiry." J.S. App. 12. The court noted that the newly enacted Chapter 886 "allows the State Board of Elections to reschedule primaries" if necessary, *id.* at 13, and that "the Census Bureau and the Department of

Justice have announced their intention to expedite proceedings for states that must meet redistricting deadlines," *id.* at 14.

With respect to Virginia's request for a declaration that Chapter 884 is not subject to Section 5 (Count I), the court similarly held that "ripeness considerations preclude [the district court's] review." J.S. App. 15. The court explained that, although that claim "presents questions of law, the relevance of these claims—and the ultimate need for their adjudication—depends entirely on the Census Bureau's release of adjusted population data." *Ibid.* The court noted that "if the Census Bureau releases only actual figures, there may well be no dispute between the parties regarding Chapter 884, and any ruling by the court now on the issues raised by count I would become an advisory opinion prohibited under Article III." *Ibid.* The court held that, for the same reasons, Virginia's claim that the Department of Justice may not use adjusted population figures in evaluating Section 5 submissions is not ripe. *Id.* at 16.

4. Virginia noticed an appeal of the dismissal of Counts I, III and IV on October 24, 2000. The Commonwealth did not appeal the dismissal of Count II. See J.S. 5 n.4. Virginia filed its jurisdictional statement on November 27, 2000.

ARGUMENT

Virginia seeks a declaratory judgment that its new state law requiring the use of unadjusted census data for purposes of state and local redistricting is not retrogressive in purpose or effect or is not subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The district court correctly concluded that Virginia's request for a declaratory judgment is not ripe for judicial review, because

resolution of Virginia's claims is contingent on the future release of statistically adjusted population data by the Census Bureau, an event that may not occur. The Director of the Census Bureau has not finally determined whether to release statistically adjusted population data for state and local redistricting under 13 U.S.C. 141(c), and his authority to release such data may in any event be revoked at any time by the Secretary of Commerce. Moreover, Virginia's claims are premised at least in part on the resolution of certain constitutional issues and on the adoption of interpretations of the Census Act that would severely restrict the States as they attempt to draw new congressional, state, and local districts. It is particularly inappropriate to resolve such questions in the hypothetical and contingent posture presented in this case. Because the district court's ruling on ripeness is correct, the court's judgment should be affirmed.

1. "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations and citation omitted). This Court has instructed that ripeness is "peculiarly a question of timing," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). The role of federal courts is not to issue advisory opinions or declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in

Article III of the Constitution. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993).

In evaluating the prudential ripeness of a claim, a court must decide "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. In determining whether a claim is "fit for judicial decision," courts look at whether the issue is essentially "legal" and sufficiently "final." *Id.* at 149; see also *Consolidated Rail Corp.* v. *United States*, 896 F.2d 574, 577 (D.C. Cir. 1990). To satisfy the "hardship prong," courts must conclude that "the impact of the regulation * * * is sufficiently direct and immediate as to render the issue appropriate for judicial review." *Abbott Labs*, 387 U.S. at 152.

2. The district court correctly held (J.S. App. 14-16) that Virginia's claim in Count I that Chapter 884 is not subject to preclearance under Section 5—*i.e.*, that it may be enforced without obtaining preclearance from the United States Department of Justice or the District Court for the District of Columbia—is not ripe for review.

a. Before the enactment of Chapter 884, Virginia law did not impose any limitations on the ability of state and local officials to use whatever census figures they chose in drawing districts. Under Chapter 884, however, state law imposes a strict requirement on state and local authorities in drawing districts. Chapter 884 requires that the State and its localities use only unadjusted census data "[f]or the purposes of redrawing the boundaries of the congressional, state Senate, and House of Delegates districts," Va. Code

Ann. § 24.2-301.1 (Michie 2000), and "[f]or the purposes of reapportioning representation" in "the governing body of a county, city, or town," *Id.* § 24.2-304.1(C) (Michie 2000).

"Congress intended [in Section 5 of the Voting Rights Act] to reach any state enactment which altered the election law of a covered State in even a minor way." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 501 (1992) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566 (1969)). It is our position that Chapter 884 altered Virginia law and therefore requires preclearance, because it substantially limits the discretion previously vested in state and local authorities regarding which figures they may use in drawing districts. In addition, there may be factual issues present regarding which figures the State and its localities have used in redistricting prior to the enactment of Chapter 884 and, accordingly, the extent to which Chapter 884 changes state law. Cf. J.S. 17 n.13; J.S. App. 53-54.[4] Virginia's position, by contrast, is that Chapter 884 does not need preclearance, because state and local officials allegedly have always used unadjusted census figures.[5]

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[4] We sought discovery on these issues in the district court. Because the court dismissed the case (without prejudice) on ripeness grounds, there was no opportunity for discovery.

[5] Virginia characterizes (J.S. 16) Chapter 884 as requiring use of the same census data that state and local redistricting officials have used in the past. In addition to taking an incorrect view of the nature of the change made by Chapter 884, that argument is logically flawed. The analogous data from the 1980 and 1990 Censuses were (a) unadjusted by means of sampling and (b) deemed appropriate by the Secretary of Commerce under 13 U.S.C. 141(c) for transmittal to the States. The unadjusted data required to be used by Chapter 884 would not satisfy both conditions if the data

b. The district court correctly apprehended that the question whether Chapter 884 requires preclearance "presents questions of law," J.S. App. 15, although as we note above it may present questions of fact as well. See p. 10, *supra*. But even the questions of law that are presented by Count I are presented in a uniquely abstract setting. As the district court noted, "the ultimate need for the[] adjudication" of those claims "depends entirely on the Census Bureau's release of adjusted population data." J.S. App. 15. If the Census Bureau releases only unadjusted data, "there may well be no dispute between the parties." *Ibid.* That is because the question whether Chapter 884 should be precleared would have no practical effect; in that event, Chapter 884 would merely dictate that Virginia state and local authorities must use the same, unadjusted data that are the only data released by the Census Bureau and the only data the state and local authorities would use in the absence of Chapter 884. Accordingly, although there may still be an abstract controversy regarding whether Chapter 884 limits discretion previously vested in state officials and whether such a limitation on discretion would constitute a voting change in the circumstances present here, there would be no genuine disagreement between the parties regarding any step that Virginia might take in its redistricting. Cf. *Boehner* v. *Anderson*, 30 F.3d 156, 163 (D.C. Cir. 1994) (dismissing, on ripeness grounds, a challenge to a congressional pay raise statute because no quadrennial salary adjustment had been proposed or enacted).

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ultimately released under Section 141(c) are adjusted rather than unadjusted.

c. Virginia rests its argument that its claim is ripe on the proposition that "release of the adjusted data is *inevitable*." J.S. 10. See also, *e.g.*, J.S. 3 (Department of Commerce "has now virtually ensured that population data adjusted by sampling *will be* released"), 4 ("imminent release" of the adjusted data), 6-7 ("possibility that the Bureau will not release the adjusted Redistricting Data * * * is so remote and speculative that there is simply no 'if and when' about it"). The district court, however, correctly found that the Census Bureau "has not yet committed" to releasing the adjusted data. J.S. App. 12; see also *id.* at 4 ("[T]he Census Bureau announced that it has not yet determined whether to release the adjusted data for purposes of state redistricting under § 141(c)."). Instead, the Bureau has stated that, although it "currently expects that the corrected numbers using [sampling] will be the more accurate numbers, it will not release adjusted data if it does not have confidence in the [sampled] results." *Id.* at 5 (internal quotation marks omitted). In short, any commitment by the Census Bureau to release adjusted data would come only after the Bureau "evaluates the quality and accuracy of the A.C.E. process." *Id.* at 12. Accordingly, release of the adjusted data remains a contingent future possibility.

Moreover, the regulations currently in force carefully acknowledge the Secretary of Commerce's authority to revoke the delegation to the Census Bureau and to decide himself whether to release adjusted data, and the Secretary's likely course of action in this regard cannot at present be known. The regulations explicitly state that they do not "diminish[] the authority of the Secretary of Commerce to revoke or amend this delegation." 15 C.F.R. 101.1(a)(5); see also 65 Fed. Reg. at 59,715 ("[T]he current, or any future Secretary of Commerce

could revoke th[e] delegation by issuing another final rule doing so."). See also 13 U.S.C. 195 (granting to the Secretary the authority "*if he considers it feasible*, [to] authorize the use of the statistical method known as 'sampling' in carrying out the provisions of [the Census Act]") (emphasis added). This year, the data for Virginia are likely to be available sometime in March 2001.[6] In 1991, the Secretary himself made a determination, on the basis of an extensive analysis, not to release adjusted data. See *Wisconsin* v. *New York*, 517 U.S. 1, 10-12 (1996). It cannot currently be known whether the Secretary of Commerce will revoke the Census Bureau's authority and again decide not to release the adjusted data, as in 1991.

For the reasons given above, Virginia's claim is therefore not ripe for adjudication because it depends upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). As the Court explained in *Texas* v. *United States*, 523 U.S. 296, 301 (1998), in which Texas similarly sought a declaratory judgment that a newly enacted statute did not require preclearance under Section 5, the claim here requires the district court "to hold that under no circumstances can the [operation of the state law for which preclearance is sought] constitute a change affecting voting." But, as in *Texas*, a

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[6] By law, the data to be used for redistricting must be released by April 1, 2001. 13 U.S.C. 141(c) ("within one year after the decennial census date"). The Census Bureau has stated that it "cannot begin to deliver population data earlier than March 2001." J.S. App. 51. Thus, although the Bureau has announced that it will "giv[e] priority to states that need to meet early deadlines," *id.* at 14, the figures for Virginia are not likely to be ready until sometime in March 2001.

court should lack "sufficient confidence in [its] imagination to affirm such a negative." *Ibid.* "Here, as is often true, '[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Ibid.* (quoting *Longshoremen* v. *Boyd*, 347 U.S. 222, 224 (1954)). Because Virginia's claim that Section 884 makes no "change affecting voting" depends on a future contingent event that may not occur, the district court correctly held that it presents only an "'abstract disagreement' that may never materialize," J.S. App. 15 (quoting *Abbott Labs.*, 387 U.S. at 148), and it is not ripe for adjudication.

d. The district court also correctly concluded that "Virginia has not satisfied the 'hardship' prong of the *Abbott Laboratories* ripeness inquiry." J.S. App. 12. The district court noted that on the day the State enacted Chapter 884, it also enacted legislation that permits its primaries to be postponed until as late as September 11, 2001, if it is unable to draw new districts in time for the scheduled June 12, 2001, primaries. *Id.* at 13. There is precedent for taking that step, since ten years ago, after the 1990 census, the Virginia legislature moved the date of the primary from June 11, 1991 to September 10, 1991. 1991 Va. Acts ch. 1. The district court also noted that the Census Bureau and the Department of Justice had committed themselves to expedited administrative action "for Virginia and other states holding elections in 2001." J.S. App. 14. Those measures are likely to expedite the process sufficiently to permit Virginia's elections to be held as scheduled—even if the Census Bureau in the end releases both adjusted and unadjusted data. At worst,

the date of the primary election would have to be postponed, as it was in 1991.

In addition, as the district court noted, "there is nothing to prevent Virginia from redistricting on the basis of actual figures, as it claims it has consistently done in the past." J.S. App. 13. In *Texas* v. *United States*, the State made a similar claim that it would suffer hardship in the absence of a Section 5 declaratory judgment. This Court noted, with respect to the State's claim of hardship, that

> [i]f Texas is confident that the [operation of the statute] does not constitute a change affecting voting, it should simply go ahead with [administering the statute]. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction.

523 U.S. at 301-302. The same conclusion follows here.

Virginia asserts (J.S. 12-13) that this Court's decision in *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), supports its contention that this case is ripe. In *Gardner* v. *Toilet Goods Ass'n*, plaintiff manufacturers claimed that certain regulations were invalid. The Court explained that a declaratory judgment action was available to resolve that claim, because otherwise the manufacturers would have to "refuse to comply [with the regulations], *continue to distribute products that they believe do not fall within the purview of the Act*, and test the regulations by defending against government criminal, seizure, or injunctive suits against them." *Id.* at 172 (emphasis added). Thus, the "impact of the regulation could be said to be felt immediately by those subject to it in conducting their day-to-day

affairs." *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967). Here, by contrast, Virginia is not currently engaging in any course of conduct that is threatened by Section 5. To the contrary, the issue in this case could have an effect on Virginia's enforcement of Chapter 884 at the earliest in the event of a future contingency (the release of adjusted data by the Census Bureau) that will not occur before March 2001 and may not occur at all. As this Court held in *Texas*, Virginia's claim of present injury is "an abstraction no graver than the 'threat to personal freedom' that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected." 523 U.S. at 302.

e. Finally, the nature of Virginia's claims also supports the district court's finding that this case is not ripe. Virginia argues extensively (J.S. 18-29) that "Chapter 884 is not covered by Section 5 because the use of enumerated and unadjusted population counts in redistricting is mandated by the Census Act and the Constitution of the United States." J.S. 18. Virginia's claim raises constitutional questions and requires the interpretation of a federal statute in a way that threatens to alter the federal-state balance. The district court's resolution of this case properly postpones the need to resolve those issues in the highly contingent posture in which they are currently presented.

This Court held in *Department of Commerce* "that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment." 525 U.S. at 343. The Court stated, however, that the claims before it challenged the "planned use of statistical sampling to apportion Representatives among the States." *Id.* at 327; see also *id.* at 328 (the "proposed use of sampling to determine the popu-

lation for purposes of apportioning Members of the House of Representatives among the several States"). The Court had no occasion to rule on any question regarding the drawing of congressional districts within each State, and it certainly did not rule on any question regarding the primary subject matter of Chapter 884 at issue here—the drawing of state legislative districts.[7]

Virginia's contentions therefore require this Court to reach statutory and constitutional issues that it did not address in *Department of Commerce* and whose resolution should, if possible, be avoided until presented in a more concrete context. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985); *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). With respect to the argument that the Census Act requires States to use unadjusted data, Virginia does not specify where in the text of the Act such a requirement can be found. But even if there were language in the Act that suggested that Congress intended to require the States to use unadjusted data in state legislative redistricting, there would remain questions regarding Congress's constitutional authority to achieve that result. In addition, interpreting the Census Act as Virginia suggests should not be lightly undertaken, since Virginia's argument requires the Court to restrict state action in this area on the basis of a tenuous inference of con-

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[7] Although Chapter 884 also may have effects on the drawing of congressional districts, Virginia has premised its claim of hardship solely on the need to draw state legislative districts in time for the November 2001 elections. See J.S. 13-15. Since congressional elections will not be held until November 2002, Virginia's ability to draw congressional districts in a timely fashion would not be affected if adjudication of its claims regarding the preclearance of Chapter 884 were delayed until the Census Bureau releases its data in March 2001.

gressional intent. Cf. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). Similarly, Virginia's constitutional argument would require this Court to hold that the federal Constitution severely limits the ability of the States to determine the type of data that they can use in designing state legislative districts—a holding that would also significantly affect the federal-state balance.[8] See *Burns* v. *Richardson*, 384 U.S. 73, 91-92 (1966). This Court ought not pass on the important constitutional and statutory questions posed by Virginia's complaint "unless such adjudication is unavoidable." *Specter Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). None of Virginia's statutory or constitutional contentions should be accepted in an abstract and contingent setting like that provided by this case.[9]

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[8] While Virginia welcomes that restriction, not every State would necessarily share that view. Indeed, a number of localities —including the cities of Richmond, Virginia, Los Angeles and San Francisco, California, Denver, Colorado, San Antonio, Texas, Dearborn, Michigan, and Dade County, Florida, intervened in this case and opposed Virginia's arguments about the requirements imposed by the Census Act and the Constitution. See J.S. iii.

[9] The district court did not reach the merits of any of Virginia's claims and there was no development of a factual record. As a general matter, this Court "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). Accordingly, Virginia's request (J.S. 15-29) that this Court resolve its statutory and constitutional claims before those claims have been considered by any other court should in any event be rejected. In addition, the Court should not address those claims in the absence of a factual record. Such a record would presumably include the bases given by the Bureau of the Census—the agency that has been charged by Congress with the responsibility for conducting the census and reporting the results—for any decision that is made to release adjusted data, and it would also include the development of a factual record in the

3. The district court also correctly held (J.S. App. 10-14) that Virginia's claim that Chapter 884 does not have a retrogressive purpose and effect (Counts III and IV) is not yet ripe for review.

With respect to the "effect" prong of Section 5, Virginia may obtain preclearance only if it carries its burden of showing that the effect of Chapter 884 is not retrogressive—*i.e.*, of showing that application of the statute will not cause a decline in "the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Insofar as Virginia's claim here is that Chapter 884 has no retrogressive "effect" because it is not a voting change, we have addressed that argument above. See pp. 9-10, *supra*. The district court therefore correctly "assum[ed]" for purposes of analyzing the ripeness of Virginia's "no retrogressive effect" claim "that Chapter 884 is subject to preclearance under Section 5," and hence that Chapter 884 makes a voting change. J.S. App. 11.

Because the "effects," if any, of Chapter 884 cannot be known until the Census Bureau releases its population figures, the question whether Chapter 884 would have any retrogressive effects is not yet ripe for adjudication. As the district court explained, "[t]o evaluate Virginia's legislation under Section 5, the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a

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and procedure[s]," 42 U.S.C. 1973c, with respect to data used in redistricting. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967) ("We believe that judicial appraisal * * * is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.").

'retrogression in the position of racial minorities with respect to [voting].'" J.S. App. 11 (quoting *Beer*, 425 U.S. at 141). Depending on the figures released by the Census Bureau, Chapter 884 could have no effect (if, for example, the Census Bureau releases only unadjusted data or if the position of minorities in the resulting redistricting plan would not be significantly affected by the use of unadjusted, rather than adjusted, data) or it could have a substantial effect (if, for example, the Census Bureau releases both adjusted and unadjusted data, and the differences between the two data sets are such that the State's use of unadjusted data causes it to draw districts in which minorities have substantially diminished voting strength, as compared to the post-1990 redistricting).[10] There is no reason, *ab initio*, to suppose that one or the other of these possibilities, or some other outcome in between, is more likely. Accordingly, Virginia's claim for preclearance of Chapter 884 at this time is not ripe.

Because Virginia's "effect" claim is not yet ripe, there was no basis for the district court to adjudicate Virginia's claim that Chapter 884 did not have a retro-

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[10] One way in which the choice of data could have significance would be if the minority population in a given area appeared to decline if measured by the unadjusted data but to stay constant or increase if measured by the adjusted data. In that circumstance, the use of unadjusted data could cause a State to diminish minority voting strength, while use of the adjusted data could lead to maintenance of existing minority voting strength. We do not mean to suggest by the use of this or any other example that we view it as likely that the use of unadjusted data will have this effect. To the contrary, it is possible that the choice of unadjusted data would have no measurable effect on minority voting strength. The uncertainty, however, illustrates the need to have the census data in hand when determining the effect of Chapter 884 on Virginia's redistricting choices.

gressive "purpose." Under Section 5, a jurisdiction may not enforce a voting change "unless and until" it obtains a declaratory judgment that it "does not have the purpose *and* will not have effect of denying or abridging the right to vote." 42 U.S.C. 1973c (emphasis added). A jurisdiction thus may not enforce a voting change until it shows that the change lacks both the specified purpose and the specified effect. The district court's ruling that Virginia's "effect" claim is not ripe accordingly made it impossible for the court to give Virginia the declaratory judgment it sought regarding "purpose" under Section 5.

Virginia concedes in a footnote that its purpose claim "involves a factual issue," but it argues that "there is no benefit to be gained by waiting to consider it." J.S. 12 n.9. There is also, however, no benefit to be gained by deciding that issue now, since deciding just that issue would resolve nothing in terms of whether Virginia may enforce Chapter 884. The district court correctly apprehended that any judgment as to whether Chapter 884 has a retrogressive purpose must await the ripening of Virginia's claim for a declaratory judgment that Chapter 884 may be enforced under Section 5.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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